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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 268

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

E. MORGAN GRINNELL, AS EXECUTOR OF THE ESTATE OF ANNIE STONE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 17) is reported in 70 F. (2d) 705. The memorandum opinion of the Board of Tax Appeals (R. 8–11) is not reported.

JURISDICTION

The judgment of the court below was entered May 7, 1934 (R. 22). The petition for certiorari was filed August 7, 1934, and was granted October

8, 1934. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

May the value of property over which the decedent by will exercised a general power of appointment be included in her taxable estate, when she appointed the property to the same persons who would have taken under the will of the donor if the power had not been exercised and the appointees expressly elected to take under the will of the donor and not under the appointment?

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth; and
>
> * * * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

(U. S. C. App., Title 26, Sec. 1094.)

STATEMENT

The facts as found by the Board of Tax Appeals (R. 8–10) may be summarized as follows:

The decedent, Annie Stone, died September 24, 1927, a resident of the United States. John O. Stone, her father, died in 1876, a resident of New York, leaving a will whereby he devised the residue of his estate to executors in trust to divide into as many shares as there were children surviving him, or who may have died leaving issue surviving him, and to keep the same invested so as to produce a regular income. The income from the shares set apart for each child was to be applied to her maintenance and education until she reached twenty-one years of age and thereafter to her use for life. Upon the death of each child her share of the estate was given to such persons and such uses as she might appoint by will and in default of appointment her share was given to her children or issue and in default of issue to her next of kin.

John O. Stone was survived by his widow (who died many years before the present decedent) and three daughters, Sarah J. Grinnell, Ellen J. Stone, and Annie Stone (the present decedent), his only children, heirs at law and next of kin. Under the will of John O. Stone, one-third of his estate was held in trust for the benefit of the decedent during her life, and upon her death was distributable to such persons and for such uses as she might appoint by will, and in default of appointment, to her issue and in default of issue to her next of kin. The sole next of kin surviving Annie Stone, the decedent, who died without issue, were her sisters, Ellen J. Stone and Sarah J. Grinnell. By her will the decedent gave, devised, and bequeathed all the residue of her estate, including her share of her father's estate over which she had the power of appointment, to her sisters in equal shares. The value of the share of her father's estate left in trust for the decedent and over which she had a general power of appointment was $75,764.26 at the date of her death.

The decedent's sisters, by writing filed with the Surrogate's Court, elected to take the share of their father's estate left in trust for the decedent under the will of their father and not under the appointment made by the decedent in her will.

The Commissioner determined that the share of the decedent's father's estate left in trust for her and appointed by her to her sisters should be in-

cluded in her gross estate and accordingly asserted a deficiency in estate taxes of $9,628.78. The Board of Tax Appeals sustained the determination of the Commissioner. The Circuit Court of Appeals for the Second Circuit reversed.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the property appointed by the decedent by her will, under the general power conferred by the will of her father, did not pass under the exercise of the power within the meaning of the Revenue Act and, therefore, should not be included in her taxable estate.

2. In not holding that the property over which the decedent by will exercised the general power of appointment conferred by the will of her father, passed under the exercise of the power within the meaning of the Revenue Act and, therefore, must be included in her taxable estate, notwithstanding the property was appointed to the remaindermen under the donor's will and they expressly elected to take from the donor rather than under the exercise of the power.

3. In holding that the law of New York is controlling in determining whether property appointed under a general power exercised by will to the same persons who would have taken in default of the exercise of the power, passes under the exer-

cise of the power within the meaning of the Federal Estate Tax Act.

4. In reversing the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

Section 301 of the statute imposes a tax upon the transfer of the net estate of every decedent dying after the enactment of the Act and Section 302 (f) provides that in valuing the gross estate there shall be included the value at the time of death of all property "passing under a general power of appointment exercised by the decedent (1) by will."

The property here in question was left by the father of the decedent in trust for her for life and, upon her death, to such persons and such uses as she might appoint by will and, in default of such appointment, to her next of kin. The decedent by her will exercised the power and appointed the property in equal shares to her sisters, who also were her next of kin. The power of appointment clearly was general and the decedent obviously exercised the power by will. The fact that the property would have passed to the appointees as remaindermen under their father's will if the power had not been exercised is immaterial, and it is not important that under the laws of the State of New York the appointees took title to the property from the father under his will and not from the decedent under the appointment. The tax is imposed not upon the property passing at death, but upon the

power to transmit or the transmission of property by death; the shifting of the economic benefits in property is the real subject of the tax. The real question is whether the death of the decedent ripened or enlarged for the survivors valuable property rights and not whether there has been strictly a transfer of property. Upon the death of this decedent, with the exercise of the power in favor of her sisters, their estate, theretofore contingent upon the nonexercise of the power adversely, became vested free from that risk. It was the death of the decedent with the exercise of the power in favor of her sisters that ripened or enlarged valuable property rights for them. It must be concluded that the property in question passed to the sisters under the general power of appointment exercised by the decedent by will within the meaning of the statute.

ARGUMENT

Section 301 of the Revenue Act of 1926, c. 27, 44 Stat. 9 (U. S. C. App., Title 26, Secs. 1092, 1093), imposes a tax upon the transfer of the net estate of every decedent dying after the enactment of the Act and Section 302 (f), *supra,* provides that in valuing the gross estate there shall be included the value at the time of death of all property "passing under a general power of appointment exercised by the decedent (1) by will."

The property here in question was left by the father of the decedent in trust for her for life and

upon her death to such persons and such uses as she might appoint by will and, in default of appointment and issue, to her next of kin. By her will the decedent, who died without issue, devised and bequeathed such property, together with the residue of her estate, in equal shares to her two sisters who were her sole next of kin.

The power of appointment conferred upon the decedent by the will of her father clearly was general (*Whitlock-Rose* v. *McCaughn,* 21 F. (2d) 164 (C. C. A. 3d)) nor has it been otherwise contended or suggested by the respondent or the court below. It seems equally plain that the decedent exercised the power by her will whereunder she devised and bequeathed all the residue of her estate, including the property which she was allowed to dispose of under the will of her father, to her two sisters in equal shares. Thus it would appear that the property left in trust for the decedent by her father and appointed by her will to her sisters falls squarely within the provisions of the statute, for it is property passing under a general power of appointment exercised by the decedent by will, and must be included in the decedent's taxable estate. The court below, however, held that this property did not pass under the power of appointment exercised by the decedent because under the law of New York the decedent's sisters took title to the property from their father and the property passed to them under their father's will and not by virtue of the

appointment. It is argued that the appointment having been made to the same persons entitled under the donor's will in default of appointment and such persons having expressly rejected the appointment and elected to take from the donor, the attempted exercise of the power was a nullity and the property passed under the will of the donor, citing *Matter of Lansing,* 182 N. Y. 238. Whether or not that decision is sound need not be considered, but it is interesting to observe that in *Matter of Cooksey,* 182 N. Y. 92, an appointment by will of property to the same persons who would have taken anyway under the will of the donor was a valid and effectual exercise of the power and the property passed under the power. The author of the opinion in the *Lansing* case concurred in the decision of the *Cooksey* case and the author of the *Cooksey* opinion dissented in the *Lansing* case. The distinction made in the *Lansing* case seems unsubstantial. Moreover, it would seem that the ultimate basis of the *Lansing* decision, that the property did not pass under the power because in contemplation of law the appointees took from the donor and not the donee, is untenable. See *Chanler* v. *Kelsey,* 205 U. S. 466. In other jurisdictions under statutes similar to that of New York and analogous to the Federal statute it is held that property passes under the exercise of a power notwithstanding the appointees take from the donor and would have taken in default of exercise of the power. *Burn-*

ham v. *Treasurer & Receiver General*, 212 Mass. 165; *Minot* v. *Treasurer & Receiver General*, 207 Mass. 588; *Montague* v. *State*, 163 Wis. 58. Cf. also, *Moffitt* v. *Kelly*, 218 U. S. 400.

In any event, whatever may be the law of New York as declared in the *Lansing* case, which involved the state inheritance or transfer tax act, respecting the source and passage of title to property over which a power of appointment has been exercised is not material and the court below erroneously considered the local law controlling here. We are not here concerned with any state rule of property or the source of title to property, but only with the construction and application of a Federal revenue act. In such matters the laws of the States cannot control and the Federal courts must exercise their independent judgment in construing and applying the Federal statute. In *Burnet* v. *Harmel*, 287 U. S. 103, 109–110, an income-tax case, the Court, recognizing the principle that the state law regulates and controls the passage of title to property, pointed out that the principle has no application where the question is solely one of the construction and application of a Federal statute. The Court said (p. 110):

> Here we are concerned only with the meaning and application of a statute enacted by Congress, in the exercise of its plenary power under the Constitution, to tax income. The exertion of that power is not subject to state control. It is the will of Congress

> which controls, and the expression of its will in legislation, in the absence of language evidencing a different purpose, is to be interpreted so as to give a uniform application to a nation-wide scheme of taxation. * * * State law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law. * * *

In *Tyler* v. *United States,* 281 U. S. 497, 503, holding that the provision of the statute including the value of the whole property held as tenants by the entireties in the taxable estate of the deceased spouse is valid notwithstanding the state rule of property respecting the title to estates so held, the Court said (p. 503):

> According to the amiable fiction of the common law, adhered to in Pennsylvania and Maryland, husband and wife are but one person, and the point made is, that by the death of one party to this unit no interest in property held by them as tenants by the entirety passes to the other. This view, when applied to a taxing act, seems quite unsubstantial. The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions. Whether that power has been properly exercised in the present instance must be determined by the actual results brought about by the death, rather than by a consideration of the artificial rules which delimit the title, rights and powers of tenants by the entirety at common law. * * *

This principle is well established and has been followed by other Circuit Courts of Appeals. *Wear* v. *Commissioner,* 65 F. (2d) 665 (C. C. A. 3d); *Stratton* v. *United States,* 50 F. (2d) 48 (C. C. A. 1st), certiorari denied, 284 U. S. 651; *Blackburne* v. *Brown,* 43 F. (2d) 320 (C. C. A. 3d).

The court below disregarded or overlooked the essential nature of the tax and the plain purpose of the statute involved. The decision below is predicated upon the premise that since under the state law title to the property passed from the donor and not from the donee of the power, the property did not pass under the power exercised by the decedent within the meaning of the statute and hence there was no transfer from the decedent subject to the tax. The estate tax, however, is imposed upon the power to transmit or the transmission of property at death and the question in every case is not whether there has been a transfer in a strict sense but whether the death has brought into being or ripened for the survivor (the recipient of property) valuable rights not theretofore possessed. The tax is not limited to transfers of property passing directly from the decedent but includes as well property the completed transfer of which depends upon or relates to the death of the decedent. *Tyler* v. *United States,* 281 U. S. 497, 503, and *Chase Nat. Bank* v. *United States,* 278 U. S. 327. See also *Porter* v. *Commissioner,* 288 U. S. 436. The statutory provision here involved

was incorporated in the Act in aid of the purpose to reach all transfers affected by the death of the decedent.

The Revenue Act of 1918 was the first statute expressly requiring property passing under a general power of appointment exercised by will to be included in the donee's estate, and the report of the Committee on Ways and Means referring thereto (H. Rep. No. 767, 65th Cong., 2d Sess., pp. 21–22) clearly shows that Congress deemed the donee of a general power of appointment over property to be the substantial owner thereof for the purposes of the estate tax, and intended that such property should be included in the donee's estate when the power is exercised by will.

The court below in construing the statute disregarded this clear Congressional purpose and intent and in so doing violated a cardinal principle of statutory construction, as established by decision of this Court. In *Helvering* v. *New York Trust Co.*, 292 U. S. 455, this Court, quoting from *Ozawa* v. *United States*, 260 U. S. 178, 194, said (p. 464):

> It is the duty of this Court to give effect to the intent of Congress. Primarily, this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give

> it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail.

Other Circuit Courts of Appeals, recognizing the principles established by this Court, have held that property appointed by will under a general power must be included in the taxable estate of the decedent notwithstanding the appointment is to the same persons who would have taken in default of the exercise of the power and under the state rule of property title passes from the donor rather than the donee. In *Wear* v. *Commissioner, supra,* after pointing out that the tax is imposed not upon the property but upon the transmission of or the privilege to transmit property and the question is not whether there has been strictly a transfer but whether the death has brought into being or ripened for the recipients valuable property rights not theretofore possessed, the court said (p. 667):

> We have not been convinced that on the death of the donee nothing happened in respect to the property of the power and in respect to the daughters' right to the property by the exercise of the power. Before its exercise the daughters of the decedent, the twice-named recipients, had, under Pennsylvania law, an estate in the property of the power. But it was a lefeasible estate, not unlike the interest of a beneficiary in a policy of life insurance where the insured has reserved, yet has not exercised,

> the right to change the beneficiary. Their estate was liable to be wholly taken away from them by the exercise of the power in favor of others. So long as the donee lived and retained control over the disposition of the property the daughters ran that risk, which was akin to the risk of a change of beneficiaries in a policy of insurance. Not until the donee died did that risk disappear. Until then he stood in their way. Therefore it was upon his death without exercising the power adverse to them that the estate of the daughters became indefeasible. *Death, with an exercise of the power in their favor, was the event that wrought the change.* Then their estate, theretofore contingent upon the nonexercise of the power against them, became vested, like the interest of a beneficiary of a policy of life insurance becomes vested upon the death of the insured without exercising a reserved right to change the beneficiary, the value of which must, under the cases, be included in the gross estate of the insured for purposes of taxation. *Chase National Bank* v. *United States,* 278 U. S. 327. *The generating source of the change was the death of the donee without action adverse to them. That, too, was the generating source of the tax.* (Italics supplied.)

In *Lee* v. *Commissioner,* 57 F. (2d) 399 (App. D. C.), certiorari denied, 286 U. S. 563, where the nature of the tax as expounded in *Tyler* v. *United States, supra,* also is referred to, the court, in hold-

ing that property appointed in the exercise of a general power by will must be included in the donee's taxable estate, although the appointee is the remainderman under the donor's will, said (p. 402):

> It is true that, if Robert E. Lee at the time of his decease had entirely omitted to exercise the power of which he was the donee, his brother, George Bolling Lee, would have held the moiety of the former by devise under the will of W. H. F. Lee. But, on the other hand, Robert E. Lee was entitled during his lifetime to appoint the moiety to any other person, and thus defeat the devise to George Bolling Lee. Therefore the exercise of this power by Robert E. Lee at least confirmed the title of his brother to the moiety in question. *Chanler* v. *Kelsey*, 205 U. S. 466.
>
> * * * * *
>
> Accordingly, in this case the exercise by the donee, Robert E. Lee, of the power of appointment vested in him, was the "generating source" of the title of Mary M. Lee for her life or widowhood, and of George Bolling Lee in remainder, of the moiety held by the donee in the estate of W. H. F. Lee.

The decisions of other Federal courts and the Board of Tax Appeals are in accord with the decisions of the Third Circuit Court of Appeals and the Court of Appeals for the District of Columbia. *Stratton* v. *United States, supra; Minis* v. *United*

States, 66 C. Cls. 58, certiorari denied, 278 U. S. 657; *Pennsylvania Co. for Ins. on Lives, Etc.,* v. *Lederer,* 292 Fed. 629 (E. D. Pa.); *Bishop* v. *Commissioner,* 23 B. T. A. 920, and *Hancy* v. *Commissioner,* 17 B. T. A. 464. Although it does not definitely appear from the report of *Stratton* v. *United States, supra,* that the appointees of the property were remaindermen under the will of the donor, this very point was urged in the petition for certiorari in that case (No. 303, October Term, 1931, Petition and Brief in Support, pp. 36–38, Brief in Opposition, pp. 6–7).

Moreover, the consistent departmental interpretation of the statute and the administrative practice thereunder clearly demonstrates that the statute requires the inclusion of all property over which the decedent has exercised a general power of appointment by will. Article 30, Regulations 37, promulgated under the 1918 Act, specifically provided that "property appointed under a general power should be included in the estate of the appointor, although the persons to whom the appointment was made would have taken the property had the power not been exercised * * *." Substantially identical regulations were promulgated under the Revenue Acts of 1921 and 1924 which contained provisions identical with that of the 1918 Act. Article 25, Regulations 63; Article 24, Regulations 68. No similar provision was contained in Regulations 70, promulgated under the Revenue Act of 1926, but

the omission seems to have been inadvertent or possibly such a provision was considered unnecessary. The provision of the Revenue Act of 1926 is substantially identical with that of the preceding Acts. The reenactment of the pertinent statutory provision of the 1918 Act without change in the 1921, 1924, and 1926 Acts in view of the administrative interpretation of the statutes prior to 1926 would seem to indicate legislative approval of the Department's construction. *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466; *Mass. Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269, 273.

The instant case, we believe, is controlled by the principle underlying *Porter* v. *Commissioner*, *supra*. There the decedent had transferred property in trust for the benefit of his son and daughter and their children, reserving the power to alter or modify the trust instruments and to change the trusts in any manner, except that no change could be made in favor of the decedent or his estate. The Revenue Act of 1926 (the statute here involved) by subdivision (d) of Section 302 included in the gross estate all property at any time transferred by the decedent where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with another, to alter, amend, or revoke. The Court, holding that the property

transferred must be included in the decedent's estate, said (p. 443):

> The net estate upon the transfer of which the tax is imposed, is not limited to property that passes from decedent at death. Subdivision (d) requires to be included in the calculation all property previously transferred by decedent, the enjoyment of which remains at the time of his death subject to any change by the exertion of a power by himself alone or in conjunction with another. * * * Here the donor retained until his death power enough to enable him to make a complete revision of all that he had done in respect of the creation of the trusts even to the extent of taking the property from the trustees and beneficiaries named and transferring it absolutely or in trust for the benefit of others. So far as concerns the tax here involved, there is no difference in principle between a transfer subject to such changes and one that is revocable. The transfers under consideration are undoubtedly covered by subdivision (d).

The Court, rejecting the contention that the statute so construed is unconstitutional, said (p. 444):

> But the reservation here may not be ignored, for, while subject to the specified limitation, it made the settlor dominant in respect of other dispositions of both corpus and income. His death terminated that control, ended the possibility of any change by him, and was, in respect of title to the property in question,

> the source of valuable assurance passing from the dead to the living. That is the event on which Congress based the inclusion of property so transferred in the gross estate as a step in the calculation to ascertain the amount of what in § 301 is called the net estate. Thus was reached what it reasonably might deem a substitute for testamentary disposition.

Similarly, in this case, which involves subdivision (f) of Section 302 of the same statute, the decedent until her death was dominant in respect to the disposition of the property to others than herself (the power being exercisable only by will—she could not appoint to herself) and her death with the power exercised in favor of her sisters ended the possibility of appointment to others and was, in respect of title to the property, the source of valuable assurance passing from the dead to the living.

In this case the decedent clearly had a general power of appointment over property left in trust for her by her father and she manifestly exercised that power by her will in devising such property to her sisters. The mere fact that her sisters were her sole next of kin and would have taken the property under the will of their father had the power not been exercised, and under the state law the title to the property passed to the sisters from their father and not from the decedent, is not material. Nor is it of any consequence that the sisters expressly elected to take from their father and not from the

decedent. The fact remains that the decedent had a general power of appointment and that she did everything possible or required of her to exercise that power by will. The voluntary act of the sisters as recipients of property in refusing the appointment because the property came to them in any event, cannot be effective to extinguish the fact that the decedent fully and completely exercised the power. It seems plain that within the meaning of the statute here involved the property in question passed under the general power of appointment exercised by the decedent by her will and must be included in her taxable estate.

CONCLUSION

It is respectfully submitted that the decision of the Circuit Court of Appeals is erroneous and should be reversed.

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FRANK J. WIDEMAN,
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Special Assistants to the Attorney General.

NOVEMBER 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1934

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

FILE COPY

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CHARLES ELMORE CR
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

DOCKET NO. 268.

GUY T. HELVERING,
Commissioner of Internal Revenue,
Petitioner,

against

E. MORGAN GRINNELL,
as Executor of the Estate of Annie Stone,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BERNHARD KNOLLENBERG,
Counsel for Respondent.

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as Executor of the Estate of Annie Stone,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Opinions Below.

The opinion of the Circuit Court of Appeals (R. 33) is reported in 70 F. (2d) 705. The memorandum opinion of the Board of Tax Appeals (R. 15-22) is not reported.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of

February 13, 1925. The judgment of the court below was entered May 7, 1934 (R. 38).

Statement of the Case.

The statement of the case contained in the petitioner's brief (pp. 3-5) is satisfactory to the respondent.

ARGUMENT.

POINT I.

The decisions of the Circuit Court of Appeals for the Third Circuit and the Court of Appeals of the District of Columbia alleged to be in direct conflict with the decision herein are not actually in conflict.

The decision of the Circuit Court of Appeals in this case is based on the law of the State of New York with respect to the passage of property under a power of appointment. The Circuit Court of Appeals examined this law and found that an appointee under a power has the right of election to accept or refuse the appointment. An essential element of a completed appointment is that the appointee accept, and if he refuse to accept this essential element is lacking and the attempted appointment is a nullity. This is on the authority of *Matter of Lansing*, 182 N. Y. 238.

The remaindermen in the present case specifically and definitely refused the appointment. Shortly after probate of decedent's will they executed and filed with the Surrogate's Court in New York a writing in which they elected to take the property as remaindermen under their father's will and refused to take the property as appointees under decedent's will. (R. 19.)

Under these circumstances the conclusion reached by the Circuit Court of Appeals is, it is submitted, the only possible one. Section 302 of the Revenue Act of 1926, provides that "the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated— * * * (f) to the extent of any property *passing under* a general power of appointment exercised by the decedent * * *." The statute only includes the value of the property in the gross estate if it *passes under* the power of appointment, that is, if nothing is done which defeats the effectual exercise of the power of appointment. Under the law of the State of New York property demonstrably does not pass under a power of appointment where the appointee refuses to accept the appointment.

This same condition was not present in the cases of *Wear* v. *Commissioner of Internal Revenue*, 65 F. (2d) 665 (C. C. A. 3d, 1933) and *Lee* v. *Commissioner of Internal Revenue*, 57 F. (2d) 399 (App. D. C., 1932). In both of those cases the appointees were the same persons who would have taken as remaindermen if the appointments had not been made. To that extent the cases are similar to the present case. The appointees did not, however, refuse the appointment and it does not appear from the reported opinions what the law of the State of Pennsylvania and of the State of Virginia would have been in the event of a refusal.

The respondent does not concede that the decisions in the two above mentioned cases are correct. He does submit, however, that, whether correct or not, these decisions are not in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the instant case.

POINT II.

None of the other grounds relied on by the petitioner is sufficient to warrant the granting of a writ of certiorari by this Court under its Rule No. 38.

The petitioner's brief (p. 8) alleges that the writ of certiorari should be granted because "the decision below is erroneous and nullifies the manifest purpose of the intent of the statute." The respondent submits that, on the contrary, the decision below is based on a conclusion which is irresistible under the facts of this case.

The petitioner further alleges (Pet. Brief, p. 10) that "the decision below is contrary to and negatives the consistent departmental interpretation of the statute and administrative practice." The regulations of the department have not been consistent in regard to the statute taxing passage of property under a general power of appointment because the regulations which were issued in connection with the Revenue Acts of 1918, 1921, and 1924 were omitted in the case of the Revenue Act of 1926. Furthermore, the decision below is not contrary to departmental interpretation of the statute as evidenced by the department's regulations, because the regulations do not cover the situation where the appointee refuses the appointment and thus by the law of the state where the property is located completely defeats the appointment.

POINT III.

The petition for writ of certiorari should be denied.

BERNHARD KNOLLENBERG,
Counsel for Respondent.

CPY9740

RESPONDENT'S BRIEF

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DEC 3 1934

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 268

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

E. MORGAN GRINNELL, AS EXECUTOR OF THE ESTATE OF ANNIE STONE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT.

BERNHARD KNOLLENBERG,
Counsel for Respondent.

LORD, DAY & LORD,
ALLEN EVARTS FOSTER,
HARRY J. RUDICK,
Of Counsel.

November 1934.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT.

Opinions Below.

The opinion of the Circuit Court of Appeals (R. 33) is reported in 70 F. (2d) 705. The memorandum opinion of the Board of Tax Appeals (R. 15-22) is not reported.

Jurisdiction.

The judgment of the court below was entered May 7, 1934 (R. 38). The petition for certiorari was filed August 7, 1934, and was granted October 8, 1934. The jurisdic-

tion of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statement of the Case.

The statement contained in the petitioner's brief (pp. 3-5) is satisfactory to the respondent.

Summary of Argument.

Section 301 (a) of the Revenue Act of 1926 (26 U. S. C. A., sec. 1092) imposes an estate tax upon the transfer of the net estate of every decedent dying after its enactment, and section 302 (f) of the act (26 U. S. C. A., sec. 1094) (f) provides that, in valuing the gross estate, there should be included the value at the time of death of all property "passing under a general power of appointment exercised by the decedent (1) by will."

The trust estate here did not pass under the power of appointment for the reason that the appointees elected in writing to renounce their bequests under the will of Annie Stone and to take as remaindermen under their father's will, and for the further reason that, under the New York law, which governed the passage of title, "the attempt to execute the power was not effective, because it did nothing. The exercise of a power which leaves everything as it was before is a mere form, with no substance." *Matter of Lansing*, 182 N. Y. 238, 243, 74 N. E. 882, 884.

The real question is not, as stated by the Commissioner (Brief, p. 7), whether there has been a "shifting of the economic benefits in property" or "whether the death of the decedent ripened or enlarged for the survivors valuable property rights".* Had the decedent died intestate, the

*This might be the question if the constitutionality of the statute were being challenged, which is not the case.

Commissioner would not have asserted any tax. Yet there would have been a shifting of economic benefits and a ripening or enlargement of property rights for the survivors. This, therefore, cannot be the question at issue. The real and only question is whether the property "*passed under*" a power of appointment exercised by the decedent. Respondent submits that the Court below was correct in holding that within the meaning of those words as used in Section 302 (f) of the 1926 Act, where the appointees reject the appointment, there can be no passing of property under it.

Argument.

I. The property in question did not pass under a general power of appointment exercised by the decedent and should therefore be excluded from the decedent's taxable estate.

There is but a single question to be determined on this appeal:

Did the principal of the trust fund created by the will of John O. Stone who died in 1876 "pass under a general power of appointment exercised by" Annie Stone?

The will of John Stone created a trust fund, the income of which was to be paid to Annie Stone during her life. On her death, the principal was to pass to her appointees, or in default of appointment to her issue and in default of issue to her next of kin. Annie Stone's next of kin thus acquired a vested remainder in the property subject to be divested by the exercise of the power in favor of strangers. (*Matter of Haggerty,* 128 App. Div. 479, aff'd 194 N. Y. 550, 57 N. E. 120; New York Real Property Law, Sec. 41; Personal Property Law, Sec. 11.)

When Annie Stone died, she appointed the property to her two sisters, Ellen J. Stone and Sarah J. Grinnell, who were her only next of kin. But the sisters rejected the appointment by executing and filing an instrument of election whereby they renounced their right to receive said property under the fifth paragraph of decedent's will and elected to take such property under the fifth paragraph of the will of John O. Stone.

The appointees having rejected the decedent's appointment, there is no possible ground for holding that the property passed under such appointment, and the Court below so held.

The respondent challenges the Commissioner's statement (Brief, p. 8) that the instant case "falls squarely within the provisions of the statute". The statute provides—Sec. 302 (f)—that in valuing the gross estate there shall be included the value at the time of death of all property "passing under a general power of appointment exercised by the decedent (1) by will". The respondent concedes of course that the power of appointment held by the decedent was a general one. He also concedes that the decedent exercised it. But he denies that the property passed under it. The decedent exercised the power in favor of her sisters, but they were not obligated to accept the appointment. They specifically renounced it and refused to take the property under it. To say that property passes under an appointment which is specifically rejected is to stretch the elasticity of language to the bursting point.

II. **The construction of the Court below is in accordance with common sense and with the principle of decisions in effect at the time the provision in question was first included in federal estate tax legislation.**

The Commissioner concedes that if the decedent had died intestate or had refrained from including in her will any mention of the appointment, the property in question would not be included in the taxable estate. He further admits, as the facts require him to admit, that the appointment was to the very persons who would take (and in the same proportions) as remaindermen under their father's will, in default of appointment. The Commissioner's position is therefore in effect that the superfluous attempted exercise of the power determines the taxability of the property. This is an obviously unreasonable, not to say absurd, result, which the construction of the Court below avoids. This Court might well be tempted to depart from the natural meaning of the language of the statute, if necessary, to *avoid* such a result, but it is inconceivable that it will modify it to *produce* such a result.

The Respondent's construction of Section 302 (f) is further supported by two important Court decisions in force at the time a similar provision (Section 402 (c) of the Revenue Act of 1918) was first included in the federal estate tax law. These decisions are *Matter of Lansing*, 182 N. Y. 238 (1905), and *Matter of Delano*, 176 N. Y. 486 (1907), (affirmed under the name of *Chanler* v. *Kelsey*, 205 U. S. 466), cases which arose under Section 220 of Chapter 284 of the New York Laws of 1897 reading as follows:

> "Whenever any person * * * shall exercise the power of appointment derived from any dispo-

> sition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer, taxable under the provisions of this act" (the New York Transfer Tax Act).

In the *Lansing* case, counsel for the State of New York maintained that, under the provisions quoted above, the exercise of a power of appointment subjected the appointed property to the New York transfer tax even though the property was appointed to the very persons who would have taken as remaindermen anyway. The New York Court of Appeals rejected this contention, saying (pp. 243-7):

> "Her" (the appointee's) "rights were fixed by the will of her grandfather, and unless changed pursuant to its provisions her estate in expectancy would become an estate in possession upon the death of her mother. While the situation was subject to change under the power of appointment, no change was made. Although the power was exercised in form, her title was perfect without it and she derived no benefit from it. The power was to 'dispose of the remainder' and the remainder was not disposed of but continued where it was. The attempt to execute the power was not effective, because it did nothing. The exercise of a power which leaves everything as it was before is a mere form, with no substance.
>
> * * * * * * * * *
>
> "The power as it might have been exercised would have left Mrs. McVickar with no title at all, but as it was exercised it left her the same title that she had before. It gave her nothing and took nothing away from her. She is not forced to claim through the second clause of her mother's will, for she took under the will of her grandfather. She had the right of

election and could refuse to take under the appointment and still hold the property, for her title was as good without as with the exercise of the power. Her attitude in this proceeding, both now and before the surrogate, is that she took wholly from her grandfather and in no respect through the action of her mother.

* * * * * * * * *

"We pass without serious discussion that part of the statute which provides, in substance, that the failure or omission to exercise a power of appointment subjects the property to a transfer tax in the same manner as if the donee of the power had owned the property and had devised it by will. * * * because as we held in the *Pell* case such an act imposes no direct tax and is unconstitutional since it diminishes the value of vested estates, impairs the obligation of contracts and takes private property for public use without compensation."

In the *Delano* case, *supra,* the Court had sustained the State's position that where the donee of the power appointed the property to persons other than those who would have taken the property as remaindermen (or who would have taken in different proportions or subject to different conditions), the property so appointed was properly included by the State in the decedent's taxable estate. But the Court, in the *Lansing* case, found no difficulty in reconciling the two decisions, because in the *Delano* case the exercise of the power of appointment was the effective source of passing the property to the appointee or appointees, whereas in the *Lansing* case it was not.

In the light of these decisions it is fair to assume that Congress meant precisely what it said in using the words

"property *passing under* a general power of appointment", namely, that property subject to a general power of appointment is to be included in the taxable estate if "*passing under*" a power exercised by the decedent, but not if, because of default in appointment or because the appointment is superfluous, it passes under the original donor's will or deed.

Under the construction contended for by the Commissioner, the mere exercise of the power would be sufficient to bring the property within the application of the statute. But unless the statute is held to refer to an *effectual* exercise of the power, the words "passing under" become meaningless. If Congress had intended to make the mere exercise of the power the basis for the tax, the statute would no doubt have read

> "Property *subject to*" [instead of "*passing under*"] "a general power of appointment exercised by the decedent by will".

In the instant case the decedent's exercise of the power was rendered completely ineffectual by her sisters' renunciation of her appointment. "The attempt to execute the power was not effectual because it did nothing". *Matter of Lansing*, 182 N. Y. 238. It can hardly be asserted with any show of reason that property passes under a nullity.

The practice of extending the language of tax statutes by implication beyond commonly accepted limitations has never had the approval of this Court. In *Crooks* v. *Harrelson*, 282 U. S. 55, this Court said:

> "Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences

thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter.

* * * * * * * *

"Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness. In United States *v.* Merriam, 263 U. S. 179, 187, 188, 44 S. Ct. 69, 71, 68 L. Ed. 240, 29 A. L. R. 1547, after saying that 'in statutes levying taxes the literal meaning of the words employed is most important for such statutes are not to be extended by implication beyond the clear import of the language used,' we quoted with approval the words of Lord CAIRNS in Partington *v.* Attorney-General, L. R. 4 H. L. 100, 122, that 'if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute'."

III. **The real question in the present case is not "whether the death of the decedent ripened or enlarged for the survivors' valuable property rights", but rather whether there has been a passing of property under the appointment.**

The Commissioner appears to rely heavily on the following argument set forth in his brief, page 12:

"The estate tax is imposed upon the power to

> transmit or the transmission of property at death and the question in every case is not whether there has been a transfer in a strict sense but whether the death has brought into being or ripened for the survivor (the recipient of property) valuable rights not theretofore possessed. The tax is not limited to transfers of property passing directly from the decedent but includes as well property the completed transfer of which depends or relates to the death of the decedent. *Tyler* v. *United States*, 281 U. S. 497, 503, and *Chase Nat. Bank* v. *United States*, 278 U. S. 327. See also Porter v. Commissioner, 288 U. S. 436."

This argument merely confuses the issue. The respondent's position in the present case is *not*, as assumed by the Commissioner, predicated upon the proposition that the federal estate tax is imposed exclusively upon the transfer of property owned by the decedent and passing directly from the decedent at death. The three cases cited by the Commissioner establish clearly that in certain cases the tax may be and is exacted with respect to property not owned by the decedent at the time of his death, or not passing directly from him. But in these cases the statute plainly imposed the tax and the point at issue—in the *Chase* case, the inclusion in the estate of the proceeds of insurance policies over which the decedent had a power of control; in the *Tyler* case, the inclusion of property owned by the decedent and his spouse as tenants by the entirety; and in the *Porter* case the inclusion of property transferred by the decedent subject to a power of alteration,—was not the construction of the statute, but its constitutionality. As the Court below observed in its opinion (R. 22):

> "But in each of those cases (Tyler and Chase National Bank) the statute expressly covered the subject matter sought to be taxed and the question was not one of interpretation, but of constitutional power."

In the instant case, the respondent is not challenging the validity of the statute; he is merely contesting the Commissioner's interpretation of it. However, it should be borne in mind that the *Chase National Bank* case, the *Tyler* case, the *Porter* case and other cases upholding the validity of estate taxes imposed with respect to property not owned by the decedent at the time of his death or not passing directly from him, all involved property which at some prior time had belonged to the decedent. No case has gone so far as to hold that the tax applies with respect to property which was never owned by the decedent. In the instant case, the property was never owned by the decedent because under the laws of New York, at least, a general power of appointment exercisable by will is not equivalent to ownership. *Root* v. *Stuyvesant,* 18 Wendell 257, 268; *Matter of Lansing, supra.**

There is a very good practical reason for distinguishing between property which is or was owned by the decedent, and property which was never owned by the decedent, and that is the possibility of not being able to enforce the tax in the latter case. For example, if in the instant case, the decedent Annie Stone had died leaving no property of her own, there would be no means of enforcing the tax with respect to the property subject to the power of appointment. Her sisters, having taken the property under the will of their father, could not be held liable for any tax on the decedent's estate. The property, of course, would not form a part of the decedent's estate for administration purposes. It should not be inferred

*If the possession of a power of appointment were the equivalent of ownership of property, the property covered by the power would, indeed, be subject to federal estate tax; not, however, under sub-section (f) relating to transfers under a power of appointment, but under sub-section (a) of Section 302 relating to the taxation of ordinary property interests passing on the death of the deceased.

that Congress intended to enact a tax the collection of which could not be enforced.

IV. **It is respectfully submitted that the decisions of other courts which have passed upon this question are distinguishable or unsound.**

The reasoning of the Courts in the cases *Wear* v. *Commissioner*, 65 F. (2d) 665 (C. C. A. 3rd), and *Lee* v. *Commissioner*, 57 F. (2d) 399 (App. D. C.), certiorari denied, 286 U. S. 563, is apparently in conflict with the decision of the Court below in the present case, although the *Wear* and *Lee* cases may be distinguished on the ground that in neither of those cases does it appear that the donees rejected the right to take under the appointment and elected to take under the will of the donor.*

The Commissioner (Brief, p. 15) quotes from the *Wear* opinion as follows:

> "*Death, with an exercise of the power in their favor, was the event that wrought the change.* Then their estate, theretofore contingent upon the non-exercise of the power against them, became vested, like the interest of a beneficiary of a policy of life insurance becomes vested upon the death of the insured without exercising a reserved right to change the beneficiary, the value of which must, under the cases, be included in the gross estate of the insured for purposes of taxation. * * * *The generating source of the change was the death of the donee without action*

*Moreover, in the *Lee* case, the appointment effected a different distribution than would have resulted from non-exercise of the power: Had there been no exercise of the power, the decedent's brother would have received the property in fee. The decedent, by his will, provided that his widow should have a life estate in the property and that his brother should have the property only after the widow's death. The decedent's will thus cut down the estate which the brother would otherwise have received, with the result that, in the *Lee* case, the property in part passed under the exercise of the power.

adverse to them. That, too, was the generating source of the tax. * * *" [Italics Commissioner's.]

It is respectfully submitted that the Court's reasoning in the *Wear* case is not sound. The fallacy lies in the last quoted italics:

"The generating source of the change was the death of the donee without action adverse to them. That, too, was the generating source of the tax."

This statement, if correct, would justify the imposition of the tax even if the decedent had died intestate; and for the imposition of such a tax, the Commissioner himself concedes that the statute provides no basis whatever.* In the instant case *death* was the event that wrought the change—not "death, with the exercise of the power in their favor". The attempted exercise of the power was a nullity, and, as stated above, death alone would not be sufficient to form a basis for the tax.

The Court's analogy to life insurance policies is not apt, for the reason that the Court is comparing property owned by a decedent with property not owned by a decedent. Thus, if a decedent had a power of control, *e. g.*, right to change beneficiary, over policies on his life *but not taken out by him,* his death would not give rise to any estate tax on the proceeds of the policies. Yet it would be the event upon which the property would pass freed of the possibility of exercise of the power of change.

As for the *Lee* case, the Court in that case declared that

"* * * the exercise by the donee, Robert E. Lee, of the power of appointment vested in him, was the 'gen-

*Such a tax, in so far as it related to powers conferred prior to its enactment might even be unconstitutional. *Matter of Pell,* 171 N. Y. 48, 63 N. E. 789.

> erating source' of the title of Mary M. Lee for her life or widowhood, and of George Bolling Lee in remainder, of the moiety held by the donee in the estate of W. H. F. Lee."

(This language is quoted in the Commissioner's Brief, p. 16.)

Clearly, the exercise of the power in the *Lee* case was the "generating source" of the life estate of Mary A. Lee, for without it, as indicated in the footnote on page 12 herein, she would have received no interest in the property; it would have passed in fee to George Lee. Whether the exercise of the power was the "generating source" of George Lee's remainder interest is questionable, but, in any event, the Court's reasoning is obviously inapplicable to the present case, for here the decedent's exercise was rendered completely ineffectual by the refusal of her appointees to take under it.

This is clearly recognized in the opinion of the Court below in the present case:

> "* * * It is conceded that the revenue act would not have imposed an estate tax upon the transfer if the remainder had vested in possession without an attempted exercise of the power of appointment. Therefore, it hardly seems right to say that: 'The generating source of the change was the death of the donee without action adverse to them. That, too, was the generating source of the tax.' Such reasoning would require the imposition of a tax under the act even though Annie Stone had died intestate, though the statute furnishes no warrant for taxation under such circumstances. The argument of the opinion in Wear *v.* Commissioner is concerned mainly with the constitutional authority of the Government to tax property where the source of the transfer was the death

of the donee of a power 'without action adverse' to persons having interests derived under the will of the donor. We need not differ with the conclusion that it might be taxed, but we think it was not taxed by an act directed only at property 'passing under a general power of appointment' because there was no such property here. The appointees not only declined to take the gift, but the appointment when exercised in favor of the same persons who would take irrespective of it was 'a mere form with no substance' which the law of New York that regulates the passage of title has refused to recognize. Matter of Lansing, 182 N. Y. 238, 243, 74 N. E. 882. In a tax statute especially, such a doubtful imposition involving as it does an extension of the statute to cover powers of appointment, having no effective import, should not be sanctioned. Crooks *v.* Harrelson, 282 U. S. 55, 51 S. Ct. 49, 75 L. Ed. 156."

As for the other cases cited by the Commissioner (Brief, pp. 12, 16 and 17), (*Blackburne* v. *Brown,* 43 F. (2d) 320 (C. C. A. 3); *Stratton* v. *United States,* 50 F. (2d) 48, (C. C. A. 1), certiorari denied 284 U. S. 651; *Minis* v. *United States,* 66 C. Cls. 58, certiorari denied, 278 U. S. 657; *Pennsylvania Co. for Ins. on Lives, Etc.* v. *Lederer,* 292 Fed. 627 (E. D. Pa.); *Bishop* v. *Commissioner,* 23 B. T. A. 920, and *Hancy* v. *Commissioner,* 17 B. T. A. 464), it does not appear in any of them, with the exception of the *Hancy* case (which the Board followed in deciding the present case), that the property was appointed to the same persons, and in the same proportions, as would have taken in default of the exercise of the power. Neither does it appear in any of them—except the *Hancy* case—that the appointees rejected the appointment.

V. **The Court below correctly held that the law of New York determines whether there was a passing of property under the power.**

The Commissioner argues (Brief, p. 10) that whatever may be the law of New York as declared in the *Lansing* case, *supra,* the New York law is not controlling in the present case, and cites in support of the argument *Burnet* v. *Harmel,* 287 U. S. 103 and *Tyler* v. *United States, supra.*

These cases, far from supporting the Commissioner's position on this point, establish its unsoundness. The *Tyler* case involved the constitutionality of the statute in so far as it requires the inclusion in the gross estate of the entire value of property held as tenants by the entirety. This Court said, in upholding the constitutionality of the statute:

> "The decisions of the courts of Maryland and Pennsylvania follow the common law and are in accord in respect of the character and incidents of tenancy by the entirety. In legal contemplation the tenants constitute a unit; neither can dispose of any part of the estate without the consent of the other; and the whole continues in the survivor. In Maryland, such a tenancy may exist in personal property as well as in real estate. *These decisions establish a state rule of property, by which, of course, this court is bound. Warburton* v. *White,* 176 U. S. 484, 496." (Italics ours.)

As indicated by the above quotation, the general rule is that, in the absence of provision to the contrary, the application of the federal tax laws follows the rules of property in the various States, even though these rules are not uniform. Thus in community property States,* the income

Poe v. *Seaborn,* 282 U. S. 101 (1930) (Washington); *Goodell* v. *Koch,* 283 U. S. 118 (1930) (Arizona).

from the husband's personal services is taxed in equal shares to the husband and wife, although in non-community property States, the entire income from his personal services is taxable to the husband.*

In the *Tyler* case, the character of the tenancy was established by the law of Maryland. If under the law of the state, the original conveyance of the property in question had created a tenancy in common instead of by the entirety, only a part of the value of the property would have been taxed. Thus the *Tyler* case, instead of being authority for the position that the State law is immaterial, recognizes the principle that such law is controlling in cases of this nature.

In the *Harmel* case, this Court also recognized the principle when it said:

> "State law may control only when the federal taxing act by express language or necessary implication, makes its own operation dependent upon the state law."

(Quoted on p. 11 of Commissioner's Brief.)

When the statute refers to property passing under a power of appointment it at least by necessary implication if not by express language, makes its own application dependent upon the question of whether there has been a passing under the state law. If under the state law the decedent's appointment were ineffective, it could not be maintained that there was a passing of property under it.

The descent and distribution of property of decedents is a matter subject to the exclusive jurisdiction of the states (*Orr* v. *Gilman*, 183 U. S. 278), and the laws of the state

*Lucas v. Earl, 281 U. S. 111 (1930).

where the situs of the property is located, should, in the absence of clear-cut language by Congress to the contrary, control in determining whether there has been a passing of property. This principle was very recently applied by the Board of Tax Appeals (which decided the present case against the respondent herein) in *Cone* v. *Commissioner*, 31 B. T. A. Pamphlet No. 104. There the decedent had a general power of appointment. He disposed of his estate by a residuary clause without any mention of the power or any specific bequest of the property covered thereby. The Board held that under the law of Illinois where the property had its situs, the residuary bequest was not an exercise of the power, and therefore the property could not be included in the gross estate.

VI. **The Commissioner's contention that the Report of the Committee on Ways and Means sustains his construction of the statute is plainly negatived by the language of the Report.**

The Commissioner on page 13 of his Brief, asserts that the Report of the Committee on Ways and Means on the Revenue Act of 1918 (which was the first statute expressly requiring property passing under a general power of appointment exercised by will to be included in the donee's estate) shows that Congress intended that property over which the decedent had a general power of appointment should be subject to estate tax if the power was exercised even though the property did not pass under such exercise.

Assuming for the sake of argument that the present case is one in which the language of the statute is so ambiguous as to warrant a resort to the Committee Report

for guidance, the language of the Report, far from sustaining the Commissioner's construction, supports the position of the Respondent that the tax applies only to property which *passes under* the exercise of the power; and that the naked, ineffective exercise of the power does not give rise to the tax. The language of the Committee Report is as follows (pp. 21-22):

> "*There has also been included in the gross estate the value of property passing under a general power of appointment.* This amendment as well as that preceding is for the purpose of clarifying rather than extending the existing statute. A person having a general power of appointment is, with respect to disposition of the property at his death, in a position not unlike that of its owner. The possessor of the power has full authority to dispose of the property at his death, and there seems to be no reason why the privilege which he exercises should not be taxed in the same degree as other property over which he exercises the same authority. *The absence of a provision including property transferred by power of appointment makes it possible,* by resorting to the creation of such a power, *to effect two transfers of an estate with the payment of only one tax.*" (Italics ours.)

From the above, it appears that "there has also been included in the gross estate the value of property passing under a general power of appointment" and that the paramount purpose of Congress was to prevent "two transfers of an estate with the payment of only one tax". The present case clearly falls outside the language of the Report, for the attempted second transfer was rejected by the transferees who claimed the right to take and in fact took under the original deed. What happened in the present case was exactly the same as if John Stone, the decedent's

father, had left the property to the decedent for life, with remainder to her next of kin. Could it be maintained in such case that there were two transfers?

Assuming that Congress may impose a tax on the mere possession of a power of appointment, regardless of its exercise or effective exercise, the fact remains that Congress has not seen fit to do so. Had the intent of Congress been as the Commissioner asserts it to have been, is it not reasonable to suppose, as has heretofore been pointed out (p. 8), that Congress would have substituted for the words "passing under" the words "subject to". There is no more basis for emasculating the meaning of the words "passing under" than there would be for ignoring the word 'general", and making the statute include all powers, whether general or special. Indeed, an effectual exercise of a *special* power would achieve two transfers of an estate; yet, clearly only one tax would be payable, because Congress confined the statute to general powers.

The Commissioner also urges here, as he did in the Court below, that, because the Treasury Regulations promulgated under the 1918, 1921 and 1924 Acts contained a provision that "property appointed under a general power should be included in the estate of the appointor, although the persons to whom the appointment was made would have taken the property had the power not been exercised * * *" and because Congress subsequently re-enacted the statute as it originally stood, Congress must have intended the tax to apply to a situation of the kind presented in the case at bar. The argument is without force, however, first, because the Treasury Regulations have never provided that the tax shall apply to a case, like the present, where the exercise of the power is ren-

dered ineffective by the appointee's renunciation of the appointment; and second, because the rule of construction relied on is not applicable to the present case since, under the very Act (the 1926 Act) herein involved the Department omitted from the Regulations the sentence quoted above—thus indicating an abandonment by the Department of its prior position. This contemporaneous construction of the 1926 Act by the Department which tends to sustain respondent's construction of the statute, is entitled to great weight.

VII. **The Commissioner's assertion that "in other jurisdictions under statutes analogous to the Federal statute, it is held that property passes under the exercise of a power notwithstanding the appointees would have taken in default of exercise of the power" is erroneous.**

The Commissioner asserts on page 9 of his brief:

> "In other jurisdictions under statutes similar to that of New York and analogous to the Federal statute it is held that property passes under the exercise of a power notwithstanding the appointees take from the donor and would have taken in default of exercise of the power.",

and cites in alleged support of this assertion the following cases:

> *Minot* v. *Treasurer & Receiver General,* 207 Mass. 588;
> *Burnham* v. *Treasurer & Receiver General,* 212 Mass. 165;
> *Montague* v. *State,* 163 Wis. 58.

Analysis of the decisions cited show that they do not sustain the Commissioner's assertion.

The *Minot* case sustained the constitutionality of a provision in the Massachusetts inheritance tax law that:

> "Whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same * * * a disposition of property * * * shall be deemed to take place to the extent of such omission or failure."

The *Burnham* case held that the above-quoted provision was intended to cover special as well as general powers of appointment and that as so construed, the statute was constitutional, following the *Minot* case. In the *Montague* case, which involved a statute of Wisconsin containing a provision substantially the same as that in the Massachusetts statute quoted above, the Wisconsin court held that the provision was intended to cover special as well as general powers and that as so construed the statute was constitutional.

It will be seen from the above that the Massachusetts and Wisconsin statutes which the Commissioner describes as being "analogous to the Federal statute" are vitally different from the federal statute and that the Massachusetts and Wisconsin cases cited by the Commissioner do not in the least sustain his position in the present case. The defect in the Commissioner's argument is that he in effect asks this Court to interpolate in the federal statute provisions which were inserted by the legislature in the Massachusetts and Wisconsin statutes, whereas the very omission of these provisions in the federal statute shows that Congress had a different intent. Congress provided and must be assumed to have intended that under the federal act property subject to a power of appointment shall be included in the taxable estate of the decedent only if the

property passed under the exercise of the power of appointment. The inevitable inference is that in other cases property subject to a power of appointment is *not* to be included in the taxable estate. The Court below so held, and this decision was, it is submitted, sound.

Conclusion.

The property in question did not *pass under* a power of appointment exercised by the decedent, and should therefore be excluded from the taxable Estate. The decision of the Court below should be affirmed.

Respectfully submitted,

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